

No. 4091

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. J. RAUER,

Appellant,

vs.

GEORGE H. HATFIELD, as trustee in
bankruptcy of the estate of A. E.
Buckman, bankrupt, and H. M.
WRIGHT et al.,

Appellees.

BRIEF OF APPELLEE, H. M. WRIGHT,
SPECIAL MASTER.

H. M. WRIGHT,

Appellee in Person.

No. 4091

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. J. RAUER,

Appellant,

vs.

GEORGE H. HATFIELD, as trustee in
bankruptcy of the estate of A. E.
Buckman, bankrupt, and H. M.
WRIGHT et al.,

Appellees.

BRIEF OF APPELLEE, H. M. WRIGHT, SPECIAL MASTER.

Statement of Facts.

This appellee is interested in only one of the two appeals presented, by this court's order, on the one transcript of record. With the appeal by Rauer from the final decree in favor of the trustee adopting the master's report upon the accounting, the master, appellee herein, has nothing to do.

This brief is concerned with the other appeal from the court's order fixing the special master's compensation for his services. As a preliminary to the pointing out of the very few pages of a very

long record upon which the appeal now discussed rests, I state the practice as to the fixing of master's compensation.

The fundamental rule is Equity Rule, 68, reading in part as follows:

“The compensation to be allowed to every master shall be fixed by the District Court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct.”

In this district the master's compensation is sometimes covered by a stipulation of the parties covering both the amount and the party or parties chargeable, followed generally by a court's order in accordance with the stipulation. When the parties do not stipulate, it has been the practice for the master to bring the matter to the court's attention by a petition for an order. It was always Judge Van Fleet's desire that the master in his petition should state, in addition to the facts necessary to an intelligent exercise of the court's discretion, a sum deemed by the master to be just, together with a recommendation on his part as to the party or parties against whom the fee should be charged in the first instance.

The present appeal does not depend in any way upon the issue of the appeal from the decree. It is my request, and my hope, that this court may decide the present appeal promptly and not subject it to the delays necessary if it should be de-

ferred until decision of the complex issues embodied in the main appeal.

Accordingly, I point out now the documents and the pages of the record upon which the present appeal rests, as follows:

1. The special master's petition for compensation, filed January 11, 1922, Record, pages 126-128.

2. Objections to special master's petition for compensation by defendant Rauer addressed to the District Court, filed January 26, 1922, Record, pages 191-198 (apparently duplicated at Record, pages 129-136).

3. Minute Order overruling exceptions to master's report and fixing his compensation, dated September 18, 1922. Record, page 199.

4. Oral opinion of the court accompanying above minute order, rendered September 18, 1922, filed September 25, 1922. Record, pages 200-203.

5. Formal signed order overruling exceptions and fixing the master's compensation at \$1800.00, ordering that it be paid by defendant, Rauer, in the first instance within twenty (20) days from notice thereof, filed September 30, 1922. Record, pages 203-204, being the order herein appealed from.

6. Assignment of errors on appeal from last named order, filed October 14, 1922. Record, pages 380-382.

At pages 383 et seq. is the order allowing an appeal and the supersedeas bond. Other papers with respect to the preparation of the record and the perfecting of the appeal need not be noticed.

The following pages of the appellant's brief are the only ones in which this appeal is discussed:

1. Pages 9-10 stating the facts and alleging disqualification of the master by bias.
2. Pages 16-17 assigning errors in fixing master's compensation.
3. Pages 71-73 argument on appeal.

At pages 58-59, the master's disqualification by interest is also urged as a reason whereby the court was in error in entering a decree upon the master's report, a point with which this appeal has no concern.

ARGUMENT UPON ASSIGNMENTS OF ERROR I AND II.

In the special master's petition for compensation, this language occurs:

“With respect to the party against whom it is charged, it is apparent that the usual practice of this court should be followed and that it should be charged against the accounting party, namely, the defendant, J. J. Rauer. The justice of following the usual practice is apparent when it is considered that the trustee in bankruptcy is understood to have no funds in his possession and the amount found due to him from the defendant, Rauer, ought not to be depleted to the loss of the creditors in bankruptcy.”

The master here states the usual practice and might well have rested at the close of the opening sentence. What follows was a makeweight directed

to the justice of following the usual practice. It has been seized upon by this appellant as a basis for appeal.

The first assignment, designated by the appellant "exception" I, Record, page 381, states, in effect, the disqualification of the master because of financial interest in the payment of his fees.

The second assignment, or exception, Record 381, differs slightly in that it alleges that the disqualification rendered the value of the master's services nugatory and of no value.

Baldly stated, the appellant's charge here and in the court below is that the master's interest was disclosed to frame his report in favor of the trustee in bankruptcy, a party without funds, except as provided by the decree herein, and against the defendant, Rauer, a party presumably solvent, to the end that he might be sure of payment of his compensation; the assumption being that the losing party would be ordered to make the payment, as a matter of course.

The statement several times repeated in the appellant's brief (e. g., p. 72) that "it is not the intent of counsel to charge the master with conscious bias or to say he was affected by the foregoing considerations," is mere words. If it means what it says, it undercuts the objection to the report, and the charge of a biased finding. I take it that the disclaimer is only evidence of counsel's lack of courage to stand behind a very serious charge.

It will at once occur to the court (1) that it is not shown when the master gained knowledge of the trustee's lack of funds, whether before or after the report; (2) that it is not shown, and is not the fact that appellant ever urged the master's disqualification until his services were completed. These are minor points that may be passed by in the presence of a charge so serious to the integrity of the court's officer. Let us get at once to the meat of appellant's contention.

If any principle underlies the appeal, it must be general in its application. Therefore, if appellant is right, whenever an accounting is ordered to be rendered by a solvent party in favor of an insolvent party, the master must report in favor of the accounting defendant, since otherwise his report will be void for personal bias. And the implications of the theory would seem to require a charging of the master's fees to the insolvent plaintiff in the accounting, as the losing party.

In any case where a trustee in bankruptcy, having no other funds, sought to recover money that had been misappropriated from the bankrupt's estate, no valid master's report could ensue to effectuate the court's decree, unless (1) the master was ignorant of the financial responsibilities of the respective parties; or, (2) being advised, should work without pay; or, (3), a principle were established that in all accountings, the plaintiff in the accounting, rather than the accounting defendant,

should pay the master's fees out of the amount recovered for the creditors. And in the latter case, I doubt not that this appellant would charge a bias on the part of the master to make the recovery great enough to provide substantial compensation for himself; and incidentally, that the report rendered would therefore be void.

Appellant's contention is thus shown to be not only trivial, but absurd. It has no logical coherence. It seems to be the product of a mind without faith in the possibility that men can be honest.

ARGUMENT UPON ASSIGNMENTS III AND IV.

In the master's petition he stated the time employed, the record examined, the amount involved, the nature and difficulty of the services rendered. He characterizes the work done and states that it was, without qualification, the most difficult in a long experience and gives his reasons therefor. (Record 127-128.) (See also the Master's Report, Record, pages 21-22). He states that five thousand dollars (\$5000) would be a reasonable fee, and that four thousand two hundred dollars (\$4200) would be the minimum that should be allowed.

Assignment or exception III, Record 382, asserts error in the court's order fixing one thousand eight hundred dollars (\$1800) as the amount and that the services were of no greater value than seven hundred fifty dollars (\$750).

Assignment IV, Record 382, seems to be a duplicate in substance of assignment II to the effect that the services were worth nothing because of the master's disqualification.

These assignments as to value of the services seem to be abandoned since there is no discussion thereof in the brief. While I believe that this court does not consider assignments of error not noticed in the briefs, the following brief argument is presented on the assumption that I may be mistaken.

There is absolutely no point in the appeal. The fixing of a master's compensation and the determination of the party liable is a matter within the sound discretion of the trial court and this court will interfere only in the event of what amounts to abuse of that discretion. No such abuse is here shown or can be shown.

It is evidenced to the court that in his petition for a larger allowance, the special master was far out of line with the views of Judge Van Fleet, a disproportion, I may say, unique in my experience, and one that was at once embarrassing and rather humiliating. The appellee recognizes that he must have overestimated the value of his services, and yet feels that had the full range of those services been understood, the award would have been greater. Yet, if the master were here before this court as a cross-appellant alleging that the compensation awarded were too low, how could this court say that the District Court had abused its

discretion? As the master's appeal would have been unsuccessful, so must the present appeal be unsuccessful.

Citation of authority is perhaps unnecessary. The whole matter of master's fees and the principles which should govern their determination were considered by the Supreme Court of the United States in *Newton v. Consolidated Gas Co.*, 259 U. S. 101. The lower court in a rate-fixing controversy involving difficult questions and very great values had awarded the special master one hundred eighteen thousand dollars for about one year's services. While neither court fixed the compensation on the basis of a per diem, the extent of the allowance is shown by the fact that it figured out on an average over all the consolidated cases, about \$418 per day. The Supreme Court held, in effect, that while the salaries of judges might be held in mind, they were of remote application because of the temporary nature of the master's employment, and that the master is to be paid as a lawyer is paid. It was held that that matter was one for the sound discretion of the trial court. They held, however, that under all the facts, the award was excessive, and reduced it to approximately fifty thousand dollars, an average of about \$175 per day.

It is submitted that the exceptions as to the amount of the master's compensation are without the slightest foundation.

DAMAGES SHOULD BE AWARDED FOR A FRIVOLOUS APPEAL.

If Rule 30, Subd. 2 and 3, of the rules of this court, is ever to be applied, this case would seem to present an appropriate case for its application. There is no substance whatsoever in the assignments of error, and it must be patent that the appeal could only have been sued out for delay. It seems plain that the purpose of the appellant must be to delay payment of the master's compensation in the hope that this court may overturn the decree in the main appeal. Presumably appellant considers that in that case the payment of master's fees will be charged against the trustee as the losing party. Even in case of the reversal or modification of the decree, it would not follow that this court would change the incidence of the costs of the accounting. A court of equity does not usually charge its master's fees upon a party who cannot pay them.

The appeal has resulted in hardship to the master that will not be compensated by the 7% interest allowed upon the judgment in his favor. The master is not a litigant, and, as the court's officer, he should be paid promptly. The fact that process to compel payment of his fees is the summary process of attachment for contempt indicates of itself that such fees should be paid at once.

In this case the master's services began in 1917 (Record, page 19) and continued until the filing of his report in December, 1921 (Record, page 80).

His compensation was not fixed until September, 1922 (Record, page 204). The further period of over a year has elapsed by reason of this appeal, and it is only during the last named period that he will have even the partial compensation of interest. During all this period, no payment for his services has been received. In addition, the master, a practicing lawyer, has been compelled to present this appeal in his own behalf, a professional service which for another client would be compensated by an attorney's fee.

It is submitted that the appeal should be dismissed, with interest and damages of ten per cent. (10%) in addition to the interest, and costs.

Dated, San Francisco,
November 8, 1923.

Respectfully submitted,
H. M. WRIGHT,
Appellee in Person.

